STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2013
v	No. 310610 Oakland Circuit Court
ROBERT JAMES BRENT, Defendant-Appellant.	LC No. 2012-240086-FH

Before: SAWYER, P.J., and O'CONNELL and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury-based convictions of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii), two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. We affirm.

Defendant first argues that the felony-firearm and felon in possession of a firearm convictions were against the great weight of the evidence and constituted plain error. Specifically, defendant argues that there was no evidence at trial to suggest that defendant had any knowledge or contact with the pistol found under defendant's mattress; rather, the pistol was purchased, possessed, and placed under the mattress by Dwight Lamar Broom. Because defendant did not file a motion for a new trial, this Court's review is "limited to plain error affecting defendant's substantial rights." *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Generally, the analysis for whether a verdict is against the great weight of the evidence is "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998).

In this case, defendant's convictions for felony-firearm and felon in possession of a firearm were not against the great weight of the evidence, nor were the convictions plain error. The firearm offenses in this case required proof that defendant had a firearm in his possession. MCL 750.227b (felony-firearm); MCL 750.224f (felon in possession). A prosecutor may prove the possession element of both offenses by establishing actual or constructive possession of a firearm by direct or circumstantial evidence. *People v Minch*, 493 Mich 87, 91-92; 825 NW2d 560 (2012); *People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011). The prosecutor need not prove actual physical possession. *People v Burgenmeyer*, 461 Mich 431, 438; 606

NW2d 645 (2000). Rather, "a person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *Johnson*, 293 Mich App at 83, quoting *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989) (internal citation omitted).

Defendant argues that the prosecution presented no evidence that defendant had any knowledge or control of the firearm found under defendant's mattress. We disagree. The circumstantial evidence presented at trial was sufficient to support the jury's verdicts. Specifically, the police found the pistol in defendant's home, under defendant's mattress. Although defendant's fingerprints were not found on the pistol, a fingerprint technician testified at trial that only approximately 10 percent of firearms hold recoverable latent fingerprints.

Defendant maintains that Broom's testimony established that Broom, not defendant, placed the pistol in defendant's bed. Broom testified that he owned the pistol and that he personally placed it under defendant's mattress. Many details of Broom's testimony lacked credibility. Broom could not remember the manufacturer of the pistol, the kind of ammunition the pistol required, or whether the pistol was loaded. Further, the jury could reasonably reject Broom's explanation that he did not want to travel with the pistol when he had alcohol in his system. This explanation was inconsistent with Broom's testimony that he had not had a single alcoholic drink in over eight years. The explanation was also inconsistent with Broom's testimony that several hours had elapsed between his consumption of a single shot of liquor and his departure from defendant's house. Broom only testified to leaving the pistol under the mattress; he did not remember leaving the extra clip of ammunition that was found next to the pistol under the mattress. The jury apparently found Broom's testimony unbelievable, and this Court cannot disturb the jury's credibility assessment. See *Lemmon*, 456 Mich at 637.

Even if Broom were the owner of the pistol, defendant's firearms convictions could stand on the evidence that defendant had constructive possession of the pistol. See *Burgenmeyer*, 461 Mich at 438. Here, Broom's testimony was not so substantial and credible that it preponderates so heavily against the verdict that defendant's convictions were a miscarriage of justice. The trial evidence indicated that the pistol was found between defendant's mattress and box spring, in defendant's home, where defendant was packaging and selling marijuana. Even without any direct evidence linking defendant to the pistol, the circumstantial evidence in the case suggests that the pistol was in defendant's possession. Therefore, because there was evidence by which to convict defendant of possessing the pistol, the convictions do not result in plain error affecting defendant's substantial rights.

Defendant next argues that he received ineffective assistance of counsel at trial in violation of his United States and Michigan constitutional rights. Defendant argues that because his trial counsel failed to list and subpoena Broom as a witness, the prosecution did not have an opportunity to interview Broom prior to trial. Defendant contends that because the prosecution was unaware of Broom's testimony until trial, the prosecution did not engage in plea negotiations concerning the firearms charges.

An appellate challenge to the effectiveness of trial counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This

Court must find the facts, then analyze whether the facts "constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* The lower court's findings of fact are reviewed for clear error. *Id.* "Questions of constitutional law are reviewed de novo." *Id.* Because defendant did not move for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to the existing record. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Consequently, this Court must analyze defendant's constitutional arguments de novo based on the existing record.

Criminal defendants have a right under the United States and Michigan Constitutions to the effective assistance of counsel at trial. *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish ineffective assistance of counsel, a criminal defendant must show that (1) under prevailing professional norms, counsel's performance fell below an objective standard of reasonableness; (2) but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different; and (3) the proceedings were fundamentally unfair or unreliable. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Michigan Courts employ a presumption that counsel's performance is effective, and there is heavy burden upon the defendant to prove otherwise. *Vaughn*, 491 Mich at 670.

The right to effective counsel extends to plea negotiations. *Lafler v Cooper*, ___ US ___; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012). To establish prejudice arising from ineffective counsel during plea negotiations, a defendant must show a reasonable probability that the outcome of plea negotiations would have been different if counsel had acted effectively. *Id.*, ___ US at ___; 132 S Ct at 1384.

In this case, defendant has not established that the late addition of Broom as a witness affected any plea negotiations. During the oral argument on whether the trial court should allow Broom to testify as a late-endorsed witness, the prosecution briefly mentioned "maybe we [could have] talk[ed] resolution" if the prosecution had known of Broom's proposed testimony prior to trial, and if the prosecution then determined that Broom was credible. The prosecution never indicated that plea negotiations would likely have been different. Moreover, the prosecution had the opportunity to assess Broom's testimony at trial. Had the prosecution found the testimony persuasive, the prosecution could have dismissed the firearms charges before submitting the case to the jury. Given the credibility deficit involved in Broom's testimony, defendant has not overcome the burden of establishing that the late designation of Broom as a witness was ineffective with regard to potential plea negotiations or to trial. *Vaughn*, 491 Mich at 670; see generally *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly